



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

HC. CIVIL MISC. APPL. NO. 283 OF 2017

JUBILEE INSURANCE CO. LTD1ST APPLICANT

AON KENYA INSURANCE BROKERS LTD.....2ND APPLICANT

VERSUS

AMWIRI JOSEPH MWENDA.....RESPONDENT

RULING

1. The Application dated 14th July, 2017 principally seeks orders that:

1. Spent

2. Spent

3. That this Honourable Court be pleased to admit the applicants' intended appeal out of time against the judgment of the Chief Magistrate's Court in Civil Suit Number 1123 of 2012: Amwiri Joseph Mwenda v Jubilee Insurance Company Limited & another delivered on 2nd June, 2017.

4. That this Honourable court be pleased to stay the execution of the judgment and decree made in Civil Suit Number 1123 of 2012: Amwiri Joseph Mwenda v Julilee Insurance Company Limited & another pending the lodging, hearing and determination of the intended appeal to this Honourable Court.

2. The application is predicated on the grounds stated therein and is supported by the affidavit of Collins Nyaema, the 1st Applicant's Legal officer. It is stated that the judgment of the Lower Court was delivered on 2nd June, 2017 against the Applicants for the sum of Ksh.930,230/= plus costs and interest. The Applicants are dissatisfied with the said judgment and wish to appeal. The delay in filing the appeal is attributed to consultations which resulted in the instructions to appeal being given after time had lapsed. It is averred that the Applicants goods have been proclaimed by Auctioneers and the Applicants therefore stand to suffer substantial loss. That the intended appeal which has high chances of success will be rendered nugatory. The Applicants are willing to deposit security for the due performance of the decree by way of provision of a bank guarantee.

3. The application is opposed. It is stated in the replying affidavit that the draft Memorandum of Appeal has failed to demonstrate that the intended appeal has any chances of success. It is further averred that

the Applicants failed to call any witnesses in the primary suit. That following the transfer of the trial magistrate the Applicants got another chance to call their witnesses when the case was heard *de novo* but again failed to call any witnesses. It is further stated that the Applicants have failed to give any reasons why the court should exercise its discretion in their favour.

4. During the hearing of the application, the parties opted to file written submissions. I have considered the said submissions.

5. The Applicants seek an order of stay of execution. Order 42 rule 6(2) of the Civil Procedure Rules, 2010 is therefore applicable. The said order provides as follows:

“No order for stay of execution shall be made under sub-rule (1) unless –

(a) The court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

(b) Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”

6. Under Section 79G of the Civil Procedure Act, although an appeal from the Lower Court to the High Court should be filed within 30 days, the appeal may be admitted out of time upon sufficient cause being shown for not filing the appeal in time.

7. The judgment of the Lower Court was delivered on 2nd June, 2017. The instant application was filed on 14th July, 2017. The delay in filing the appeal is by about twelve (12) days. The delay is not inordinate and has been explained. No prejudice will be suffered by the Respondent that cannot be compensated by an award of costs.

8. On substantial loss, it is not in dispute that the Applicants’ property was proclaimed by Auctioneers. However, there are no allegations that the execution process is not lawful nor any allegations made that the Respondent is not capable of refunding the decretal sum in the event that the appeal is successful.

9. On whether the Appeal has high chances of success, under Order 42 Rule 6 (2) of the Civil Procedure Rules, the Applicants are seeking orders of stay of execution pending appeal from the Subordinate Court to the High Court. The Applicants are not required to prove that they have an arguable appeal, unlike if it was an application in respect of an appeal to the Court of Appeal seeking stay of execution of the decree of the High Court pending appeal to the Court of Appeal. (See for example **Nakuru HCCC 211/98-Martha Njeri Wanyoike & 3 others –vs- Peter Machewa Mwangi & 5 Others; Bake ‘N’ Bite (Nrb) Limited –vs- Daniel Mutisya Mwalonzi [2015] eKLR**).

10. On the other hand, the Respondent in his written submissions conceded to the application upon three conditions. That is that the intended appeal to be filed within 30 days; that the Applicants to give a bank guarantee and that the Auctioneer’s costs be paid by the Applicants.

11. The Applicants are entitled to exercise their undoubted right of appeal. However, the Respondent is also entitled to enjoy the fruits of his judgment. To balance the competing interests of both parties and taking into account the Respondent’s submissions, I allow the application on the following conditions:

- a) The Applicants to give a bank guarantee for the decretal sum within 14 days from date hereof.
- b) The intended appeal to be filed within 14 days from date hereof.
- c) Costs of the application to the Respondent.

Dated, signed and delivered at Nairobi this 14th day of Dec., 2017

B.THURANIRA JADEN

JUDGE